FILED
03-399 SEP 9 2003
OFFICE OF THE CLERK

No. ___-____

IN THE
Supreme Court of the United States

October Term 2002

COMMONWEALTH OF KENTUCKY
Petitioner

versus

JOHNATHAN SHANE MCMANUS
and
ADAM LEVI KEISTER
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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CAPITAL CASE

QUESTION PRESENTED

I. SHOULD THE EXCLUSIONARY RULE'S GOOD FAITH EXCEPTION EXTEND TO **PRE-WARRANT ENTRIES** WHERE POLICE REASONABLY BUT MISTAKENLY BELIEVE THERE IS PROBABLE CAUSE AND AN EXIGENCY?

PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS UNDER REVIEW

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PETITION FOR WRIT OF CERTIORARI

The Attorney General of the Commonwealth of Kentucky, petitions this Court to issue a writ of certiorari to the Supreme Court of Kentucky.

OPINIONS BELOW

The Kentucky Court of Appeals reversed Respondent's convictions by unpublished opinion rendered November 3, 2000. (Nos. 99-CA-3071 and 99-CA-2867).

The Kentucky Supreme Court affirmed that reversed by published opinion rendered June 12, 2003. It is reported as Commonwealth v. McManus, Ky., 107 S.W.3d 175 (2003).

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a). The Kentucky Supreme Court rendered its decision on June 12, 2003. This petition has been filed within 90 days of that date.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the Constitution of the United States provides in relevant part:

> **The right of the people to be secure in their persons, however ... against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . . .**

The Fourteenth Amendment to the Constitution of the United States provides in relevant part:

> **. . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .**

STATEMENT OF THE CASE

Respondent Keister's estranged wife complained to police of a marijuana growing operation inside a residence he shared with Respondent McManus. Consent to search was denied. As police were leaving, they stood on a public sidewalk and observed through the picture window Respondent and an unidentified man frantically running

back and forth with paraphernalia associated with the cultivation of marijuana.

The officers radioed a supervisor and the County Attorney, both of whom recommended a pre-warrant application entry if they believed that evidence of a crime was being destroyed.

Immediately upon entry, the officers observed marijuana plants in plain view. The suspects were restrained while police awaited a search warrant which was based in part on their plain view observation incident to the warrantless entry.

Respondents were engaged in a major marijuana cultivation and LSD manufacturing operation. The evidence was seized pursuant to a warrant whose independent validity has never been directly questioned. (TR McManus, 25-27; TR Keister, 22-24).

The events leading up to the seizure of the evidence do not appear to be in dispute. On July 30, 1998, Sergeant Jonathan Hayden of the McCracken County Sheriff's Office received information from Detective Jim Osborne of the Murray Police Department that

Respondents were cultivating marijuana at a residence they shared somewhere near the Kentucky Oaks Mall in Paducah. (Supp. Hrg. Video 12/15/98, 11:38:39-11:39:39). Respondent Keister's estranged wife, Katrina Keister, had told Detective Osborne about the marijuana growing operation. (Tr. Prelim. Hrg., 21). She "did not want any involvement whatsoever" and "would probably not be cooperative". (Id., 22). On August 5, 1998, the police through the use of a computer were able to correctly identify the address as 938 Loraine Lane. (Supp. Hrg. Video 12/15/98, 11:39:39-11:40:00; 11:49:38-11:49:54). Civil papers of some kind, possibly related to a divorce action, had been served on Respondent Keister there only a few days previously. (Id., 11:39:39-11:40:00; 12:19:14-12:19:45; 12:28:40-12:28:43).

The police were well aware that Katrina Keister's uncorroborated complaint was not probable cause sufficient to obtain a search warrant. (Tr. Prelim. Hrg., 23; Supp. Hrg. Video 12/15/98, 11:50:20-11:50:42). Sergeant Hayden knew that any attempt to get a search

warrant would be futile, so no application was made. (Id.).

Consequently, the police decided to use a "knock and talk" approach to investigate the complaint. (Supp. Hrg. Video 12/15/98, 11:52:00-11:52:20). Sergeant Hayden generally considers the knock-and-talk approach to be, as he did in this instance, a "last resort" in the investigation of drug cases. (Id., 11:52:55-11:53:12).

Sergeant Hayden and the two officers who accompanied him knew in advance that if their request for consent to search were denied, they had "no backup plan". (Id., 11:52:00-11:52:20). The officers had no planned course of action in the event that Respondent McManus denied Katrina Keister's complaint or refused to give them his consent to search the residence. (Id.).

Accompanied by Detective Ronnie Ashley and Detective Dennis Hines, Sergeant Hayden proceeded to 938 Loraine Lane on August 6, 1998. (Id., 11:40:00-11:40;17). Respondent McManus answered the knock at the door, stepped outside and closed the door behind him, and a brief conversation ensued. (Id., 11:40:57-11:41:19). The officers immediately identified themselves, informed

Respondent McManus of the nature of the criminal complaint they had received, and requested consent to search the residence. (Id., 11:40:00-11:40:17).

Respondent McManus denied the request for consent to search, which the officers scrupulously honored. (Id.). He told the officers that two other persons lived with him. (Id.). He assured the officers that if there was any marijuana inside the residence, he would get rid of it. (Id., 11:40:00-11:40:17, 11:41:27-11:41:36). The officers left. (Id., 12:01:58-12:02:07).

When the officers reached the sidewalk adjacent to where their cars were parked, Detective Ashley glanced back at the residence and told the others to look at what he was seeing. (Supp. Hrg. Video, 12/15/98, 11:41:36-11:42:30). The public sidewalk where the officers stood was 36 feet from the front door of the residence. (Id., 11:47:05-11:47:45).

From their vantage point at the sidewalk, the officers observed through a picture window Respondent McManus and another man (later identified as co-defendant Teddy Noel) running back and forth

"frantically" while carrying items associated with marijuana cultivation. (Id., 11:41:36-11:42:30). As Sergeant Hayden would later testify at the suppression hearing, the officers admittedly did not see any marijuana plants but they did see grow lights, plant pots, and planting trays being hurriedly carried about. (Id.). Significantly, from their prior experiences in drug crime investigations the officers "recognized" all of those items as being associated with the indoor cultivation of marijuana. (Id.).

Sergeant Hayden's characterization of the suspects "frantically running" (Id.) was not an exaggeration: they repeatedly collided while running back and forth carrying the above described marijuana cultivation paraphernalia. (Id., 11:46:59-11:47:05). The officers saw Respondent McManus and Teddy Noel actually run into each other "two or three times" while they were doing this. (Id.). "We were somewhat in awe of what we were seeing". (Id., 11:42:30-11:42:57).

Owing to the totality of the circumstances (including Katrina Keister's specific complaint and what

was seen from the sidewalk), there was no doubt in Sergeant Hayden's mind that Respondent McManus and Teddy Noel were destroying evidence of a drug crime. (Supp. Hrg. Video, 12/15/98, 11:46:11-11:46:14; 12:12:15-12:12:30; 12:15:11-12:15:42). From his "training and experience" it was clear to Sergeant Hayden that he was witnessing the dismantling and destruction of a "marijuana grow" operation. (Id., 12:12:15-12:12:30; 12:15:11-12:15:42).

Sergeant Hayden and the other officers first radioed their supervisor, Chief Deputy Terry Long, who advised that if evidence was being destroyed they should enter without awaiting a search warrant so that they could secure the situation. (Id., 11:42:30-11:42:57).

Through Chief Deputy Long, the officers next received the same advice from McCracken County Attorney Dan Boaz. (Id., 11:42:57-11:43:04). By the time of the suppression hearing some four months later, Sergeant Hayden could not recall whether the follow-up legal advice of County Attorney Boaz was communicated to him immediately before or immediately after the

officers forcibly entered Respondents' residence. (Id., 12:13:01-12:13-21).

The officers returned to the front door of the residence, knocked, and announced themselves. (Supp. Hrg. Video, 12/15/98, 11:43:04-11:43:37). When Respondent McManus and Teddy Noel failed to answer, the officers forced their way into the residence. (Id.).

Teddy Noel was caught and handcuffed in the living room. (Id.). The officers heard somebody else running through the house. (Id., 11:43:37-11:43:58). They caught Respondent McManus in the kitchen. (Id.). In clear view from where they stood in the living room and in the kitchen, the officers saw marijuana leaves scattered on the floor in a hallway leading to the bathroom and in another hallway leading to a back bedroom. (Id.).

Not knowing whether there was anybody else inside the house, the officers conducted a brief protective sweep for their own safety. (Id., 11:43:58-11:44:26). The scope of this room-to-room survey was limited to looking for other subjects and was brief in duration. (Id., 11:44:26-

11:44:55). Nothing was seized at that time. (Id., 11:47:59-11:48:36). Having preserved the status quo by securing the suspects, the officers did not begin to search for any evidence until after they applied for and received a warrant. (Id.).

Respondents' motions to suppress were (TR McManus, 110; TR Keister, 119).

On September 3, 1999, Respondent McManus conditionally pleaded guilty in accordance with a plea agreement. (TR McManus, 111-112, 115-117).
On September 3, 1999, Respondent Keister conditionally pleaded guilty in accordance with a plea agreement. (TR Keister, 120-121, 124-126).

Judgments accepting Respondents' separate guilty pleas were entered September 9, 1999. (TR McManus, 115-117; TR Keister, 124-126).

Final judgments imposing Respondents' sentences of imprisonment were entered November 22, 1999. (TR McManus, 120-122; TR Keister, 129-131).

The Kentucky Court of Appeals reversed Respondents' convictions by unpublished opinion

rendered November 3, 2000. Rehearing was denied March 23, 2001. The Kentucky Supreme Court granted the Commonwealth's motion for discretionary review by order dated March 13, 2002. That Court affirmed the reversal by published opinion rendered June 12, 2003.

REASONS WHY CERTIORARI SHOULD BE GRANTED

I.

THE UNITED STATES V. LEON, 468 U.S. 897 (1984) "GOOD FAITH" EXCEPTION TO THE EXCLUSIONARY RULE, APPLICABLE WHERE POLICE RELY ON A SEARCH WARRANT UNSUPPORTED BY PROBABLE CAUSE, SHOULD BE EXTENDED TO CASES WHERE POLICE CONDUCTING A WARRANTLESS ENTRY SHORT OF A SEARCH MISTAKENLY BUT REASONABLY BELIEVE THE ENTRY IS JUSTIFIED BY EXIGENCY AND SUPPORTED BY PROBABLE CAUSE.

The "good faith" exception to the exclusionary rule recognized in United States v. Leon, 468 U.S. 897 (1984) should be extended to pre-warrant entries where police believe in good faith that exigent circumstances and probable cause justify their entry into a dwelling for the purpose of maintaining the status quo.

The rationale of Leon was that the deterrent purpose of the exclusionary rule is not furthered where police in good faith conduct a search based on a magistrate's erroneous

assessment of probable cause. The Court has yet to recognize a good faith exception outside the context of a search conducted pursuant to a warrant. Petitioner Kentucky is not urging the Court to do so here. Rather, what Petitioner seeks in this case is no more than application of the Leon standard in instances where a good faith entry is followed by the issuance of a warrant to search.

Other decisions of the Court have upheld the warrantless seizures and searches, e.g., Pennsylvania v. Labron, 518 U.S. 938 (1996) (per curiam); Michigan Department of State Police v. Sitz, 496 U.S. 444 (1990); Warden, Md. Penitentiary v. Hayden, 387 U.S. 294 (1967). The denominator common among those decisions was absolute correctness on the part of police in their emergency assessments that both probable cause and exigent circumstances were present. By definition, an exigency such as that which excuses the warrant requirement is one that a police officer must assess without the benefit of prior magisterial consideration.

Respondent's case is somewhere on the continuum between cases where a magistrate makes an unhurried

assessment of probable case, and cases where exigencies require the police to completely "go it alone". To extend the good faith exception to pre-warrant entries would not depart from this Court's longstanding requirement of obtaining a search warrant whenever time and circumstances permit.

II.

THE POLICE IN THIS CASE OBTAINED ATTORNEY ADVICE AFTER WITNESSING FROM A PUBLIC SIDEWALK THE ONGOING DESTRUCTION OF EVIDENCE INSIDE RESPONDENTS' RESIDENCE. IF POLICE LACKED PROBABLE CAUSE AS THE STATE APPELLATE COURT SAID, AT A MINIMUM THEY HAD A REASONABLE AND ARTICULABLE SUSPICION THAT EVIDENCE OF A CRIME WAS BEING DESTROYED BEFORE A WARRANT COULD BE OBTAINED. THE POLICE DID NO MORE THAN WAS NECESSARY TO SECURE THE PREMISES AND THE OCCUPANTS AND CONTENTS THEREIN. NO SEARCH TOOK PLACE UNTIL AFTER A WARRANT WAS ISSUED.

In Segura v. United States, 468 U.S. 796, 804 (1984), the majority emphasized that, "The only issue here is

whether drugs and the other items not observed during the initial entry and first discovered by the agents the day after the entry, under an admittedly valid search warrant, should have been suppressed." Unlike Segura, the inquiry in Respondent's case involve drugs seen in plain view immediately upon entry, as well as drugs not observed until after a search warrant was issued.

In Segura, the United States conceded the absence of exigent circumstances such as would justify the warrantless entry made by the agents. The initial entry in Segura was "therefor illegal". Id. By contrast, Petitioner in the present case has not conceded and does not now concede the existence of exigent circumstances and probable cause prior to the officers' warrantless entry. Without conceding the absence of either, Petitioner assumes for the sake of argument that neither exigent circumstances nor probable cause existed prior to entry because the Kentucky Supreme Court so held.

The officers in the present case scrupulously honored Respondent McManus' refusal of consent to search. They observed from a public sidewalk paraphernalia and

behavior which confirmed the tip they had received form Respondent Keister's estranged wife. The officers sought and obtained legal advise, first from a supervisor and later from the County Attorney. Immediately upon entering, the officers saw marijuana plants just inside the door - - a plain view observation which is not a search. The officers did not conduct a search until after receiving a warrant. (As in Segura, the validity of the search warrant itself has not been challenged.)

What the police did here bears little difference to what was approved in Illlinois v. McArthur, 531 U.S. 326 (2001), where the suspect was detained outside of his residence but was accompanied by police inside while a search warrant was being obtained. McArthur stressed that the entries into the residence were minimally invasive. The police in Respondent's case likewise tailored their pre-warrant entry in order to be as minimally invasive as possible. As did the officers in McArthur, the police in Respondent's case acted in good faith from beginning to end.

III.

THE EXCLUSIONARY SANCTION SERVES NO MORE PURPOSE WHERE POLICE REASONABLY RELY ON A MAGISTRATE'S ERRONEOUS DETERMINATION OF PROBABLE CAUSE, THAN WHERE THEY RELY ON THEIR OWN ASSESSMENT OF PROBABLE CAUSE REASONABLY BUT MISTAKENLY, IN WHAT THEY PERCEIVE TO BE AN EMERGENCY SITUATION.

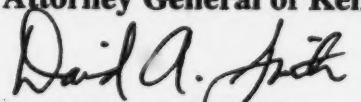
In United States v. VanLeeuwen, 397 U.S. 249 (1970) and United States v. Place, 462 U.S. 696 (1983), "the Court has allowed temporary seizures and limited detentions of property based upon less than probable cause." Segura v. United States, supra at 806, n. 6 (plurality opinion). The majority in Segura upheld the pre-warrant seizure of a dwelling despite the government's later admission that exigent circumstances - - the basis for the warrantless seizure - - did not actually exist. The ensuing search was upheld in Segura because the agents already had probable cause, which they did not realize.

In Respondent's case, the police in good faith believed they had probable case and exigent circumstances when the pre-warrant entry was made. United States v. Leon, supra recognizes that the deterrent purpose of the exclusionary is not furthered by excluding evidence obtained by good faith reliance on a search warrant. In the present case, it is safe to assume that such purpose likewise would not be furthered by the exclusion of evidence obtained after a police officer's good faith reliance on the only advice usually available in a reasonably perceived and articulable emergency - - his own.

CONCLUSION

For the foregoing reasons, the Attorney General of the Commonwealth of Kentucky requests that this Court grant a Petition for Writ of Certiorari to the Supreme Court.

ALBERT B. CHANDLER III
Attorney General of Kentucky



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No. __-____

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ON PETITION FOR WRIT OF CERTIORARI
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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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Supreme Court of Kentucky
2001-SC-0312-DG

COMMONWEALTH OF KENTUCKY APPELLANT

APPEAL FROM MCCRACKEN CIRCUIT COURT
V. NOS. 98-CR-00185-001 & 98-CR-00185-002
COURT OF APPEALS NOS. 99-CA-3071 & 99-CA-2867

JONATHONSHANEMCMANUS
ANDADAM LEVI KEISTER APPELLEES

OPINION OF THE COURT BY JUSTICE STUMBO

AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

On July 30, 1998, Jon Hayden, a McCracken County Deputy Sheriff, received information that McManus and Keister, the appellees herein, were cultivating marijuana

at the residence they shared in Paducah, Kentucky. This information was relayed to Hayden by an officer of the Murray Police Department, who had received said information from Keister's estranged wife. The address of the residence, 938 Lorine Lane, was located via a civil summons previously served on Keister. During the evening hours of August 6, 1998, Hayden, along with two other deputies, traveled to the McManus and Keister residence in order to investigate the information previously received . The law enforcement officers did not secure a search warrant before they went to the residence because they did not believe they had sufficient reliable information to obtain one. They knocked on the door of the residence;

McManus answered and then stepped out onto the porch in order to speak with the officers . The officers informed McManus that they had received information that

marijuana was being cultivated inside the home, and asked for McManus' consent to search the premises. After McManus declined there quest, the officers cautioned

McManus that if there was marijuana being grown inside the residence, he should dispose of it, as the officers would likely return. The officers left the residence . As they reached the public sidewalk, one of the officers noticed that the blinds were open on the picture window, which was located to the right of the front door. For the next several minutes, the officers observed McManus and an other man running in a

frenzied manner through out he residence carrying items the officers deemed to be related to the indoor cultivation of marijuana, including pots and grow lights . Hayden contacted Chief Deputy Terry Long, who instructed Hayden to secure the residence by a warrantless entry, if Hayden believed that evidence was being destroyed. Long sought and received the same advice from the McCracken County Attorney. Hayden and the other officers then forced their way in to the residence. Marijuana plants, and other incriminating evidence, were recovered as a result. McManus and the other man were taken into custody. Keister was not inside the residence at the time, but was apprehended soon thereafter. In the McCracken Circuit Court, both McManus and Keister moved to suppress the evidence recovered at their residence. The appellees contended

that the warrantless entry conducted by the McCracken County Sheriff's Department was in violation of the Fourth Amendment to the United States Constitution and Section 10 of the Kentucky Constitution . The trial court did not agree and denied the motions .

McManus then entered a conditional guilty plea under RCr 8.09 to one count. This is the background image for an unknown creator of an OCR page with image plus hidden text. each of trafficking in marijuana (KRS 218A.1421), tampering with physical evidence (KRS524.100), and possession of a controlled substance in the first degree (KRS 218A.1415) . Keister entered a conditional guilty plea under Rcr 8.09 on one count of cultivation of marijuana (KRS 218A.1423) and for being a persistent felony offender (PFO) in the second

degree (KRS532.080(2)). Both received a sentence of ten years in prison.

McManus and Keister appealed to the Court of Appeals seeking review of the trial court's denial of the irrespective motions to suppress. A unanimous panel of the Court ofAppealsconcluded thatthe trial courtcommitted errorby not granting the suppression motions. The panel also held that there were no exigent circumstances sufficient to justify the warrantless entry of the appellees' residence. It was further held that the circumstances relied upon by the police were created by the officers' visit to the McManus home. The Commonwealth petitioned the Court of Appeals for a rehearing,

which was denied . The Commonwealth then sought discretionary review of the instant matter in this Court, which was granted. We now consider the points of error asserted by the Commonwealth.

I.

The Commonwealth first argues that it was error for the Court of Appeals to determine that no exigent circumstances existed to justify the warrantless entry into the McManus and Keister residence. Absent exigent circumstances, law enforcement officers may not enter an

individual's private residence in order to conduct a warrantless search. Payton v. New York ,445 U.S. 573, 590, 100 S.Ct .1371, 1382, 63 L.Ed.2d 639, 653 (1980). The Commonwealth bears the burden to demonstrate that exigent circumstances were resent justifying the

warrantless entry. Valev. Louisiana ,399 U.S. 30, 34, 90S.Ct. 1969, 1972, 26 L. Ed. 2d 409, 413 (1970) . "It is fundamental that all searches without a warrant are unreasonable unless it can be shown that they come within one of the

exceptions to the rule that a search must be made pursuant to a valid warrant." Cook v. Commonwealth, Ky., 826 S.W.2d 329, 331(1992). The Commonwealth also carries the burden to demonstrate that the warrantless entry into the McManus and Keister residence falls within are cognized exception. Gallman v. Commonwealth, Ky., 578 S.W.2d 47,48 (1979). The Commonwealth contends that the officers believed that McManus and another man were destroying evidence related to the offense of marijuana cultivation. Destruction of evidence is a recognized exigent

circumstance creating an exception to the warrant requirement. Cormney v. Commonwealth, Ky.App., 943S.W.2d629,633 (1996) (citing Taylor v .Commonwealth, Ky.App., 577 S.W.2d 46 (1979)) .The Commonwealth relies on Segura v.United States,468 U.S .796,104S.Ct.3380,82L.Ed. 2d 599 (1984), where the United States Supreme Court held "that securing a dwelling, on the basis of probable cause, to prevent the destruction or removal of evidence while a search warrant is being sought is not itself an unreasonable seizure of

either the dwelling or its contents ." Id. at 810.

The Commonwealth's reliance on Sequra is misplaced. Unlike the law enforcement officers in Segura, the officers here did not have probable cause to enter the appellees' residence . In Sequra , the officers "had

abundant probable cause in advance of their entry to believe that there was a criminal drug operation being carried on in petitioners' apartment." Id. Specifically, the officers" had maintained surveillance over petitioners for weeks, and had observed petitioners leave the apartment to make salesofcocaine." Id .at810-811,104S.Ct.at3388. Here the officer shall not

This is the background image for an unknown creator of an OCR page with image plus hidden text. conducted a surveillance operation of the appellees' residence. Furtemore, Deputy Hayden admitted that he and the other officers did not have probable cause to obtain a search warrant based solely on information originating from Keister's estranged wife. However, the Commonwealth asserts that the information from

Keister's estranged wife, coupled with the officers' own observations at the residence, reasonably gave the officers probable cause to believe that marijuana was being cultivated in the residence. Since the officers were concerned that evidence was being destroyed, exigent circumstances were present authorizing the warrantless entry of the appellees' residence. We are not persuaded by this contention . The Superior Court reaffirmed the rule that a warrantless search, absent exigent circumstances, is not legal. Id. at 810,104S.Ct.at3388."Where there are exigent circumstances in which police action literally must be `now or never' to preserve the evidence of the crime, it is reasonable to permit action without prior judicial

evaluation." Roaden v.Kentucky, 413 U.S .496, 505, 93 S.Ct. 2796, 2802, 37 L.Ed.2d 757,765 (1973). While the officers observed items that could be related to marijuana cultivation, they did not observe marijuana or any other illegal substance, only flower pots and grow lights. As stated above, the officers were aware they did not have probable cause to receive a search warrant before they went to the appellees' residence. Further, the Commonwealth failed to establish that the observed grow lights, pots and planting trays could be destroyed before a warrant could be obtained. Under the circumstances, we do not think it was reasonable for the officers to enter the appellees' residence with out prior judicial evaluation . "Before agents of the government may invade the sanctity of the home, the burden is on the government to demonstrate

exigent circumstances that overcome the presumption of ureasonableness that attaches to all warrantless home entries." Welsh v. Wisconsin, 466 U.S .740, 750,104 S.Ct. 2091, 2098, 80 L .Ed.2d 732, 743 (1984). The Commonwealth has not adequately demonstrated that exigent circumstances existed to overcome this presumption . Therefore, we find no error in the Court of Appeals' decision .The trial court should have granted both motions to suppress. Because we have held that there were no exigent circumstances, we need not address the Commonwealth's second issue .

II.

The Court of Appeals, applying Johantgen v. Commonwealth, Ky. App., 571 S.W.2d 110 (1978), reversed the trial court outright because "a conviction [was] impossible absent the evidence obtained by the unconstitutional entry and seizure." The Commonwealth asserts the Court of Appeals exceeded the scope of its authority when it essentially directed an acquittal in favor of McManus and Keister by "ruling on evidence admissibility as opposed to evidence sufficiency." We agree.

We have held that it is not the province of this Court to determine if "the Commonwealth can produce sufficient competent evidence to avoid a directed verdict of

acquittal upon retrial." Osborne v. Commonwealth ,Ky., 43S.W.3d234, 245 (2001).

Likewise, it was not within the Court of Appeals' authority to essentially direct a verdict in favor of the appellees. The Commonwealth is free to continue its prosecution of the appellees . However, any such prosecution will be without the benefit of evidence gathered as a result of the unlawful warrantless entry. For the reasons aforesaid, we affirm the Court of Appeals on Point I, reverse on Point II, and hereby remand this matter to the McCracken Circuit Court for further

proceedings in accordance with this opinion .

Cooper, Johnstone and Keller, JJ ., concur. Graves, J ., dissents by separate opinion, with Lambert, C.J.,and Wintersheimer, J., joining that dissent.

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RENDERED: JUNE 12, 2003
TO BEPUBLISHED

Supreme Court of Kentucky
2001-SC-0312-DG

COMMONWEALTH OF KENTUCKY
APPELLANT

APPEAL FROM MCCRACKEN CIRCUIT COURT
V. NOS. 98-CR-00185-001 & 98-CR-00185-002
COURT OF APPEALS NOS. 99-CA-3071 & 99-CA-2867

JONATHQNSHANEMCMANUS
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APPELLEES

DISSENTING OPINION BY JUSTICE GRAVES

Respectfully, I dissent. I believe the proper disposition of this matter is an order of remand to the circuit court for entry of findings of fact and conclusions of law as previously requested by the Commonwealth Attorney. On May 19, 1999, the trial

court entered a one-line order denying Appellees' motion to suppress, namely, "IT IS HEREBY ORDERED that the defendants' motion to suppress is DENIED." The trial court made no findings of fact or conclusions of law.

On September 8, 1999, after entry of Appellees' conditional guilty pleas, the Commonwealth filed the following motion: Pursuant to RCr 9.78, the Commonwealth moves that the Court enter the Findings of Fact, Conclusions of Law and Order Denying Motion to Suppress, filed with this motion. In support of this motion, the Commonwealth states that the Court has denied the defendants' motion to suppress . The defendants have now pled guilty, under the condition that they be permitted to appeal the Court's denial of their motion to suppress. Findings of Fact and Conclusions of Law have not been entered setting forth the Court's reasons for its decision .

So moved this 8th day of September, 1999.

CriminalRule9 .78provides, inpertinent part, as follows: If . . . a defendant moves to suppress. . . . the fruits of a search, the trial court shall conduct an evidentiary hearing . . .and at the conclusion thereof shall enter into the record findings resolving the essential issues of fact raised by the motion . . . and necessary to support the ruling . If supported by substantial evidence the factual findings of the trial court shall be conclusive. Brown v.Commonwealth, Ky.App., 564S.W.2d 24,28 (1978), holds that RCr 9.78 requires the trial court to make findings of fact supporting its decision to grant or deny a motion to suppress evidence of a confession or other incriminating statements or evidence of fruits of a search. The trial judge is in the best position to determine the credibility and sufficiency of the evidence and an appellate court is bound by the findings of fact of the trial judge unless there is a clear error or abuse of discretion.

Meaningful appellate review is impeded in this case because the trial court did not enter findings of fact.

Without a reasoned explanation, neither the parties nor this

Court knows the rationale for the court's ruling. Consequently, should the trial court find and conclude that exigent circumstances existed, this matter should be affirmed as a matter of law. I am of the opinion that the frenzied destruction of marijuana cultivation paraphernalia, plainly observed by sheriff's deputies from a public sidewalk, created a exigency of sufficient magnitude to justify the warrantless entry into Appellees' home.

Warrantless entry is justified when police must act "now or never" to preserve evidence of criminal activity. Roaden v. Kentucky, 413 U.S. 496, 93S. Ct. 2796, 37 L.Ed.2d 757 (1973). Exigent circumstances may occur which excuse the warrant requirement when the physical destruction of incriminating evidence is imminent. Cormney v. Commonwealth, Ky.App., 943 S.W.2d 629 (1996).

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The United States Court of Appeals for the Sixth Circuit has held that in order to temporarily dispense with the warrant requirement police officers must show "a

reasonable belief that third parties are inside the dwelling" as well as an "objectively reasonable basis for concluding that the loss or destruction of evidence is imminent."

UnitedStates v .Sangineto-Miranda , 859 F.2d 1501, 1512 (6thCir.1988) . Furthermore, in evaluating police claims of exigent circumstances, courts must "consider the totality of

the circumstances, as well as the `inherent necessities of the situation at the time .'" Id . at 1512, quot in United States v. Rubin, 474 F.2d 262, 268 (3dCir.1973), cert. denied, 414 U.S .833 (1973).

Police officers, due to their training and experience, may legitimately perceive criminality in objects or conduct that would appear innocent in the perspective of an untrained layman. Texas v.Brown, 460 U.S .730, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983). See also

Washington v. Chrisman, 455 U.S .1, 102 S.Ct .812, 70 L.Ed.2d 778 (1982). Deputy Sheriff Hayden immediately recognized that the grow light, pots, and trays inside Appellees' home were likely associated with the cultivation of marijuana .

That insight, augmented by the tip as well as by McManus' apparent destruction of evidence following the "knock and talk," properly led Deputy Hayden to conclude that exigent circumstances were present necessitating warrantless entry. In section IV of Segura v. United States, 468 U.S . 796, 104 S.Ct. 3380, 82 L.Ed.2d 599 (1984), Chief Justice Burger pointed out that seizures of premises are less likely to violate the Constitution than are searches, because seizures affect only possessory interests rather than the more highly protected privacy interests . In Section IV of Segura, however, the Chief Justice was joined only by Justice O'Connor. In differentiating between searches and seizures, the Chief Justice opined:

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[T]he heightened protection we accord privacy interests is simply not implicated where a seizure of the premises, not a search, is at issue. We hold, therefore, that securing a dwelling, on the basis of probable cause, to prevent the destruction or removal of evidence while a search warrant is being sought is not itself an unreasonable seizure of either the dwelling or its contents. Id . at 810 (emphasis in original) .

The absence of a true exigency necessitating warrantless entry does not inexorably lead to the exclusion of evidence obtained in a subsequent search . If information sufficient to support a probable cause determination existed independent of any evidence discovered during an illegal entry, evidence discovered later pursuant to a judicially sanctioned search warrant is not tainted. Segura , supra, (majority opinion, §§ I-III,V&VI). The preceived by the McCracken County Sheriff's Department, along with the observation of marijuana cultivation paraphernalia inside the McManus home, provided independent

grounds upon which to base a search warrant. No evidence discovered in the warrantless entry was required in the probable cause determination, despite the fact that such evidence was included by Deputy Hayden in the warrant application.. The Fourth Amendment prohibits only searches that are unreasonable. Here, the police officers had reasonable belief of a crime being committed based not only on reliable information, but also on personal observation that there was indoor cultivation of marijuana. Delaying entry would have created a substantial risk that evidence would have been destroyed . These critical circumstances dictated that a seizure be executed immediately to preserve the status quo without the delay attendant to obtaining a warrant. This was an exigent circumstance because there was an immediate compelling need for official action and insufficient time to secure a warrant.

In United States v. Korman, 614 F.2d 541, 545 (6th Cir. 1980) cert. denied, 446 U.S. 952 (1980), the United States Court of Appeals for the Sixth Circuit approved of the lower court's deferential attitude toward law enforcement officers: It is also to be noted in this regard that the case law is clear that the agents, in reaching a decision of the nature that they did here, need only have sufficient information to justify the warrantless entry to reasonably conclude that evidence would be destroyed or removed. A hindsight, Monday-morning quarterback position, which might show that in fact that was not about to happen, is not the standard by which their conduct is to be judged, but rather the situation as it appeared to them at the time. The presence or absence of exigent circumstances involves a finding of fact which is reviewed for clear error. United States v. Richard , 994 F.2d 244, 248 (5th Cir. 1993) . In the absence of a full evidentiary hearing and findings of fact by the trial court, it is impossible for any reviewing court to determine the legality of the

seizure. The trial court should make the requested findings of fact concerning exigent circumstances. Lambert, C.J ., and Wintersheimer, J ., join this dissenting opinion.